Supreme Court, U. S.
FILED
AUG 31 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1280

ALEXANDER J. BARKET,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY TO THE MEMORANDUM AND SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

VERYL L. RIDDLE
THOMAS C. WALSH
ROBERT F. SCOULAR
500 North Broadway
St. Louis, Missouri 63102
Attorneys for Petitioner

BRYAN, CAVE, McPHEETERS & McROBERTS
Of Counsel

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1280

ALEXANDER J. BARKET,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY TO THE MEMORANDUM AND SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Although the petition in the instant case was filed almost a month before the petition in *Abney v. United States*, No. 75-6521, the government delayed its response in this case in order to push the weaker *Abney* case to the forefront and relegate the instant matter to deferred status. The government orig-

inally acquiesced in both petitions, asking the Court to rule that the Court of Appeals was without jurisdiction to entertain the double jeopardy question. The government suggested, however, that *Abney* should be granted and *Barket* held, despite the fact that *Barket* was fully briefed below and decided by the Court of Appeals on a plenary opinion. Unlike *Abney*, the instant case presents a clear-cut instance of double jeopardy and prosecutorial overreaching, which would provide a very distinctive backdrop against which to resolve the jurisdictional question common to both cases.

Certiorari was granted in *Abney* on June 14, 1976, and that case is presently in the process of being briefed on the merits. Petitioner Barket has filed a brief *amicus curiae* in *Abney* discussing the jurisdictional question.

In spite of the government's original position that the instant case should be either reviewed or held, the Solicitor General has now filed a supplemental memorandum urging that the petition should be denied "so that this case may proceed to trial without further delay." Having maneuvered *Abney* ahead of this case in order to obviate consideration of the compelling double jeopardy question presented herein, the government now seeks to obscure that important constitutional question by overshadowing it with the jurisdictional issue. For the reasons stated in the petition herein, the double jeopardy question—independent of the jurisdictional issue—demands review by this Court. The retrial which the government now seeks is flatly forbidden by the double jeopardy clause and by this Court's ruling in *Ashe v. Swenson*, 397 U.S. 436 (1970). The facts of this case fit squarely within *Harris v. Washington*, 404 U.S. 55 (1971), and *Turner v. Arkansas*, 407 U.S. 366 (1972).

The government's reply to the merits of the petition is completely lacking in substance and would strip *Ashe v. Swenson* of any meaning whatsoever. Although the prosecutor has twice

conceded that the retrial of petitioner is barred by the double jeopardy clause, the Solicitor General now asks this Court to sanction the prosecutor's judicially-noticed harassment of petitioner and to permit a violation of his constitutional rights. The government's current double jeopardy dilemma is directly attributable to the United States Attorney's penchant for pyramiding charges in order to maximize the pressure on petitioner to "cooperate" in the ongoing and thus-far fruitless investigation of so-called "political corruption" in the previous Democratic state administration. In an earlier case brought against petitioner, the record showed that the U.S. Attorney had obtained multiple-count indictments virtually without evidence merely for the purpose of exerting pressure, had leaked grand jury data to the news media and had used the grand jury process to harass witnesses. The district court dismissed the indictment for prosecutorial misconduct and pre-indictment delay, and that dismissal was upheld by the Eighth Circuit. *United States v. Barket*, 530 F.2d 189 (8th Cir. 1976). The government did not seek review in this Court.

In his thirst for a felony charge, the U.S. Attorney here has parlayed a garden-variety investigation of a single minor campaign contribution into a two-count indictment including a felony charge under 18 U.S.C. § 656. He elected to proceed on that charge and attempted to prove certain facts which are necessarily common to both counts. The incontestable reality, however, is that the trier of fact found a failure of proof on three critical issues which are essential to the charge yet to be tried. The government, simply by changing the name of the crime, now wants another chance to use the very same evidence to prove the very same facts which it has previously been unable to establish.* Judge Henry Friendly had this to say about that:

---

* In view of the government's attempt to cloud the meaning of the trial court's findings, we have set forth verbatim in Addendum A, *infra*, the relevant portions of the oral ruling of the district court.

"The Fifth Amendment guarantees that when the government has proceeded to judgment on a certain fact situation, there can be no further prosecution of that fact situation alone: The defendant may not later be tried again on the same fact situation, where no significant additional fact need be proved, even though he be charged under a different statute. He may not again be compelled to endure the ordeal of criminal prosecution and the stigma of conviction. These are the plain and well understood commands of the Fifth Amendment in forbidding double jeopardy. Here there was one sale of narcotics. The government should have but one opportunity to prosecute on that transaction. Although in such a prosecution it may join other charges based on the same fact situation, it may not have a succession of trials seriatim." *United States v. Sabella*, 272 F.2d 206, 212 (2d Cir. 1959).

CONCLUSION

Because of the elementary nature of the double jeopardy issue, petitioner respectfully suggests that if certiorari is not to be granted now, the Court should continue to hold this case until resolution of *Abney*. If the jurisdictional question is resolved affirmatively in *Abney*, this case should then be summarily reversed, as were *Harris* and *Turner*. On the other hand, if the Court determines in *Abney* that the Court of Appeals was without jurisdiction, the judgment below could then be summarily vacated in light of *Abney*. Should the Court desire briefs on the merits of this case, it may wish to grant certiorari at the beginning of the Term and then, after consideration of such briefs, take appropriate action either in conjunction with *Abney* or following disposition of *Abney*.

Respectfully submitted,

VERYL L. RIDDLE

THOMAS C. WALSH

ROBERT F. SCOULAR
500 North Broadway
St. Louis, Missouri 63102
Attorneys for Petitioner

BRYAN, CAVE, McPHEETERS & McROBERTS
Of Counsel

August, 1976

ADDENDUM

ADDENDUM A

Excerpts From Oral Opinion of Judge John W. Oliver Acquitting Petitioner of Offense Alleged in Count II of the Indictment

In this case the government alleged that on or about the 15th day of October 1968, the defendant, being an officer and director of the bank, with intent to injure and defraud said national bank, wilfully and knowingly did misapply money and funds of said bank in the amount of $9144, by paying said funds of the said bank to Rudolph E. Zatezalo under the guise of a bonus salary which had not been earned and which had not been authorized by the Board of Directors of the said bank, for the purpose of making an unlawful political contribution, all in violation of Title 18, United States Code, Section 656.

The question of law presented by the defendant's motion for acquittal is whether or not the government has adduced sufficient evidence which the trier of the fact, either a jury or a judge sitting as a trier of the fact, could make a finding which would sustain the government's claim that the bonus, whether earned or not, and whether or not authorized by the Board of Directors, findings which the Court could make and would make in the government's favor, was nevertheless a "wilful" misapplication made, No. 2, with intent to injure and defraud the bank, and (3) made with the purpose of making an unlawful political contribution.

Now, what evidence did the government actually adduce in regard to the crucial allegation of the indictment?

* * * * * * *

But the most important witness in regard to the actual operation was not available in the trial of this case because of

the exercise of his rights as guaranteed by the Constitution of the United States. Perhaps with that testimony, there may have been adduced some sort of evidence upon which to make a finding supported by factual data as distinguished from conjecture and speculation that the defendant acted wilfully.

The greatest difficulty, it seems to me, is proof and evidence to support any sort of finding that whatever the defendant may have done, he did for the purpose as alleged by the government "to injure and defraud his bank."

The evidence in this case establishes to my satisfaction that the deposits of the bank were built on political connections, and that the defendant was attempting to keep friendly with whatever powers may have controlled the selection of friendly banks.

To say that this sort of business was to injure his bank when political connection was dependent on maintaining the bank is a finding which I cannot make in this case.

* * * * * * *

It is my judgment, and I find, that there was an equal failure of proof on the part of the government that the purpose of the defendant's action was the making of an "illegal" political contribution. The insertion of the word "illegal" in the indictment was not before the word "purpose." It was before "political contribution."

The government's theory that under Section 656 that it may establish a case under that statute by ignoring the requirement that there must be a finding of conversion as defined both in the *Britton* case and the *Bevans* case in the Eighth Circuit, and that there must be substantial evidence to show that the defendant's conversion was for either his own benefit or the benefit of another, cannot be salvaged by the government's effort to have this court somehow read into Count II the Section 610 allegations of Count I.

The addition of the word "illegal political contribution" substantially helped the government from suffering dismissal before trial. There are many illegal political contributions that if the full testimony of all knowledgeable persons were elicited, that may have been capable of establishment.

The evidence in my judgment however, does not support really an allegation of "illegal," and there is an apparent gap in the evidence that some of the contributions which carry Mr. Houtchens' signature or notes, namely, Plaintiff's Exhibits 31 and 32—one of those exhibits has no date at all; it does list a $5,000 contribution from Dr. Zatezalo.

Because Dr. Zatezalo was placed in funds by Mr. Patti and Mr. Barket, I would draw the inference that whatever funds on the list of Missouri contributions of Humphrey for President were included in that document.

There is difficulty, however, in tying the $7500 bonus contribution to either Dr. Zatezalo, Barket, Patti or anyone else in light of the fact that Plaintiff's Exhibit 32 carries a date of October 14, 1968, and all of the undisputed evidence in this case establishes that Dr. Zatezalo didn't even write a hot check until that date and it was not in funds to be cleared until some two days later.

Those matters may have been subject to clarification by the testimony of the man who carried the bag, but he wasn't here.

Every case I try before a jury, I state the constitutional standard of proof beyond reasonable doubt, that all defendants charged in a court of the United States are presumed to be innocent, that they are entitled to rely upon any testimony developed on cross-examination, that they are not obligated to adduce any evidence whatever, that the failure of proof as well as the absence of proof is ground for acquittal.

Had this case been before a jury, I would have granted the defendant's motion and directed the entry of a judgment of acquittal. In a non-jury case I make the same grant and to reflect what the action of the Court is and its determination that sufficient evidence has not been adduced to prove the defendant guilty beyond reasonable doubt.

I am writing the words "Not Guilty" in the verdict, signing it, and handing it to the clerk for filing.

* * * * * * *